Supplemental Petitioner's Brief

APR 22 1982

No. 81-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,

v.

CLAIBORNE HARDWARE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

PETITIONERS' MOTION FOR LEAVE TO FILE REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF AND PETITIONERS' REPLY TO SUPPLEMENTAL BRIEF

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PETITIONERS' MOTION FOR LEAVE TO FILE REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF

At oral argument of this case on March 3, Justice Blackmun asked counsel for Respondents to file a supplemental brief "pointing out where in this voluminous record . . . evidence is present" that "ties each one of these incidents to these particular remaining defendants." Tr. 34. Respondents filed their supplemental brief on

April 8. Petitioners respectfully move for leave to file the accompanying reply to that supplemental brief.

Respectfully submitted,

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PETITIONERS' REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF

In their brief (Resp. Br. 41) and again at oral argument (Tr. 21), the respondent merchants suggested to the Court that a comprehensive analysis of the record could be presented establishing a relationship between the petitioners and certain alleged acts of violence occurring in Claiborne County during the period of the boycott in this case. At oral argument, Justice Blackmun took up this offer and invited counsel to "poin[t] out where in this voluminous record . . . evidence is present" that "ties each one of these incidents to these particular remaining defendants." Tr. 34.

After spending over five weeks mining 16,000 pages of record, the merchants have now filed a supplemental

brief that succeeds only in demonstrating the dearth of evidence responsive to Justice Blackmun's question. We respond here briefly to the first three sections of the merchants' supplemental brief.[1]

1. *"Management" of the boycott.* While the merchants promised the Court that they could tie every petitioner to some unlawful act, their extensive review of the record has identified—at the most, *see* pages 7-10 *infra*—only 16 of the 91 individual petitioners who could even arguably be tied to any arguably illegal act over the entire period of the boycott. Accordingly, in order to say *something* about as many of the petitioners as possible, the merchants have resorted to the ersatz conspiracy theory that mere attendance at NAACP meetings by any of the petitioners made them "managers" of the boycott and of everything that happened during the boycott. Supp. Br. 1-8. The merchants assert, without citation to the record, that participation in Tuesday night NAACP meetings was "the principal way in which boycott activists exercised control over the conduct of the boycott for good or ill" (Supp. Br. 2).

This new theory[2] cannot be squared with the principles of free association established by decisions of this Court.

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[1] The fourth section, an effort to support the judgment of liability against petitioners Charles Evers and the NAACP, purports to provide "further record evidence" of Evers' "intentions and modus operandi." Supp. Br. 14. But this "further record evidence" does not tie Evers to any boycott-related activity at all, other than his April 21, 1969 speech discussed in our briefs.

In their fifth section, the merchants concede that the judgment against Helen Beasley, Bill Beasley, Calvin Blackburn, Mary Ella Dee, Harvey Ellis, Katie Ellis, and Arthur Wyatt cannot be sustained even under their own conspiracy theory. Supp. Br. 16-18.

[2] Contrary to the merchants' suggestion (Supp. Br. 5), they did not select "regular participants in the weekly management meetings" of the NAACP as the defendants in this action. Their Bill of

In fact, the merchants' "management" theory has already been rejected by the Mississippi Supreme Court. That court dismissed the claims against numerous non-petitioner defendants "for insufficient proof, lack of proof, or otherwise" (App. 26a), including several as to whom the only record evidence of boycott participation was that they attended NAACP meetings.[3] Neither court below made any findings as to the conduct of the NAACP meetings. Testimony cited by the merchants indicates that discussions of the boycott at these meetings took the most recognized forms of associational expression: "We was just begging the people to comply with us. That's all we ever did discuss when I was there." R. 6972. The merchants cite no evidence that these Tuesday night meetings either directed or sanctioned violence or threats of violence. If the discussion at NAACP meetings of the boycott of petitioner Lee's grocery store is indeed "illustrative," as the merchants suggest (Supp. Br. 4), what it illustrates is the similarity between boycott activities in Port Gibson during the civil rights movement and those contemplated by the Continental Association over two hundred years ago, calling on the colonists not to patronize those who continued to trade with British merchants. *See* Pet. Br. 20.

The merchants do claim that those who attended NAACP meetings had "full knowledge of the tactics" used in "the enterprise" (Supp. Br. 2) and "knew that fear was a major factor in the success" of that enterprise (Supp. Br. 5). That claim fails as a matter of law, however: The First Amendment does not permit such

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Complaint named 146 individual defendants and "each of the individuals whose names are unknown to complainants but who are included herein as a class" (R. 27), primarily under sweeping secondary boycott and trade restraint theories of liability that have since been dismissed from the case.

[3] *Compare* Brief of Appellants NAACP and All Individual Appellants 22 & n.25 (August 29, 1979), *with* App. 26a.

"enterprise" liability based upon mere knowledge of the actions of others with whom one maintains some general political affiliation. *See* Pet. Br. 36-39. The claim also fails as a matter of fact, because the record does not support the assertion that persons who attended the meetings knew of the unlawful (or even purportedly unlawful) acts of others, much less that fear of unlawful acts was "a major factor in the success of the enterprise."[4]

In fact, the merchants failed at trial to establish knowledge by the petitioners—whether gained at NAACP meetings or elsewhere—of most of the very "incidents" upon whose purported notoriety they have relied so heavily. There is no evidence that any black person in Claiborne County had ever heard of the trampling of Mrs. Butler's flower garden, the snatching of Eddie Lewis' whiskey bottle, or the shooting into the Cox home. The only person who testified he had ever heard of the slashing of Jasper Coleman's tires was petitioner Matt Ross, who was asked to repair them. R. 11289. Only petitioner Alex Warner testified he had ever heard that Willie Myles was "stopped" because he violated the boycott. R. 10679. Only petitioner James Odom testified he had ever heard that Laura Cullins' house was shot at. R. 9281-82. Only Odom and petitioner Jimmy Ellis testified they knew or had heard that Murriel Cullins' car was vandalized. R. 8942, 9282. And while several wit-

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[4] A number of the merchants' citations for the proposition that participants in meetings "knew that fear was a major factor in the success" of the boycott are citations not to record evidence of *knowledge*, but of *acts*. J.A. 77, 121, 312, 374. Except for the reading of names, the limited "knowledge" cited by the merchants is generally unrelated to anything learned or done at NAACP meetings. Most of it is the same testimony cited in their main brief that a few witnesses had heard that non-boycotters would be "punished" or have "trouble." J.A. 110-11, 157-61, 219-21, 337-38, 399, 412. *See also* J.A. 225-27. As we have demonstrated, this testimony cannot support the merchants' theory of liability. *See* Pet. Br. 24-25; Pet. Rep. Br. 9 n.8.

nesses testified they knew that Emerson Davis had been involved in numerous fights around town, only two had even heard rumors that he had been beaten up in connection with his failure to observe the boycott. R. 3585, 5648.[5]

The courts below made no finding of either knowledge or ratification of unlawful acts by persons attending NAACP meetings. The judgment below cannot be sustained on the basis of attendance at meetings held to discuss common political aims and objectives and to discuss such lawful methods of enforcement as denunciation and ostracism of those who failed to observe the boycott.

2. *Store watchers and Deacons.* The merchants also suggest that anyone who was a "store watcher" or who was a member of the Deacons could be held liable because of that fact alone. Supp. Br. 8-9. No such finding could have been made on this record.

Those persons whom the merchants have labelled "store watchers" were volunteers who worked to ensure the success of the boycott by observing white stores and trying to persuade blacks from patronizing them and (in some cases) reporting the names of those who did patronize. Men, women, and children all participated in these activities (J.A. 148-49; R. 678, 14646-47, 14662-63), which began very early in the boycott and were observed and photographed by the police (R. 987, 7753-54).[6] The

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[5] Similarly, although we do not believe that petitioner Evers' April 21, 1969 speech was unlawful, the single remark in that speech that Evers would "break [the] neck" of boycott violators was not widely known or remembered. Only six of the 22 black witnesses asked about this 1969 remark testified they had heard of it. *Compare* R. 1248-49, 2662, 5679-80, 6203, 6667, 8912-13, *with* R. 2964-65, 4205, 4527-29, 4909-10, 5795-96, 5889, 6151, 7031-32, 9094-96, 9893-98, 10319-20, 10393, 10607, 11702, 12882, 13238-39. No black witness testified of having ever heard of any such remark by Evers at any earlier time.

[6] Photographs introduced by the merchants depicting typical "storewatching" are reproduced in the Joint Appendix. J.A. 38-39.

cited testimony with respect to petitioner Mary Ross, for example, was that she "stood in front of my store a day or two and advised them that the store was under boycott." J.A. 428 (Respondent Dobbs). Similarly, petitioner Marjorie Brandon "was on the street the first day," "telling people that the stores were under boycott" (R. 1203), as were petitioners Charles and James Collier, who were among those "running around so and grabbing people and telling them they couldn't go in the stores and trade. That's all that they were doing." R. 1204-05 (Respondent Ellis).

The courts below did not find, and the merchants do not cite any evidence, that those they have identified as store watchers engaged in or threatened any specific violent acts during the course of watching stores.[7] There is no doubt that there were store watchers (sometimes) and that they stopped people and talked to them on the public streets of Port Gibson; that was their whole function. But such First Amendment activity certainly cannot form the basis for tort liability.

As for the Deacons or "Black Hats"—a group separate from the store watchers[8]—this group was not organized

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[7] The record support for the merchants' more generalized assertion that store watching "was conducted so as to threaten prospective customers" (Supp. Br. 9) is revealing. Respondent Dobbs testified that a "young boy" had "threatened" a customer leaving his store by approaching the customer and inquiring, "Don't you know that store is boycotted?" J.A. 421-23. Dobbs explained that he considered advising people that his store was under boycott to be illegal because "I consider it detrimental to my business." He testified that such advice was a "threat" because "[t]heir names were published at the meetings of the NAACP at night, and they were read aloud." J.A. 424.

[8] The merchants erroneously assert that the Black Hats "originated at an early boycott organizational meeting." Supp. Br. 3. The testimony they have cited on this point (J.A. 147-48) is only that some who later became Black Hats or Deacons—like other men, women, and children who did not—volunteered to serve as store watchers early in the boycott.

until months after the beginning of the boycott (App. 19b; J.A. 124, 148-50) and could have had nothing to do with any "pattern" now asserted to have been established "in the very first days of the boycott." Supp. Br. 8. According to the weight of the evidence, the primary purpose of this group was to protect black persons against threats of physical violence by white persons. *See* Pet. Br. 7; Pet. Rep. Br. 6. Again, the merchants do not point to any unlawful actions undertaken by this group. Their argument, instead, is that mere status as a member of the Black Hats is itself sufficient to warrant liability, because the Black Hats were a cause of "fear." Supp. Br. 8. This argument does not advance, and the record does not support, a factual proposition that even comes close to the individual showing of responsibility required by this Court to justify liability consistent with the First Amendment. *See* Pet. Br. 36-39.

3. *The evidence of alleged unlawful acts.* In section III of the merchants' supplemental brief, it becomes clear that the merchants' undertaking to "ti[e] each one of these incidents to these particular remaining defendants" comes down to a discussion of 16 individual petitioners and 23 so-called "incidents."[9] This, it appears, is the entire "thread of fear and violence" (*see* App. 15a) complained of by the merchants. These 16 petitioners are the only ones cited (by the merchants, not by the lower courts) to have been involved in incidents in which "specific individual petitioners were identified [by testimony] as the perpetrators of illegal acts." Supp. Br. 13. Some of

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[9] One of these 16 is petitioner Charles Evers, who—although the subject of an entirely separate section of the merchants' supplemental brief—is also identified in section III as one who "physically stopped customers, or prospective customers, from entering the premises." Supp. Br. 11-12; *see* J.A. 70-71. As noted below, there is no indication that this meant anything more than verbally detaining people on the street to talk with them. In fact, this is precisely what Evers did, according to the testimony of the woman he purportedly "stopped." R. 14184.

this testimony was described by the lower courts and is discussed in our main and reply briefs. *See* App. 15a-19a; Pet. Br. 28-33; Pet. Rep. Br. 6 n.5. While we cannot know whether the remaining testimony cited by the merchants was given any credence by the courts below, there is good reason to suspect that it was not.

Some of these incidents have no fathomable connection with any business losses that could have been sustained as a result of the boycott of the merchants by the black citizens of Claiborne County. The merchants now cite, for example, the testimony of respondent James Hudson, a white merchant, that petitioner Marcus Jones grabbed Hudson's daughter's arm and said, "Come on go with me." Supp. Br. 11; *see* J.A. 58-62. They also cite Hudson's testimony that petitioner Rudy Shields threatened a white person about shopping in stores (Supp. Br. 11), and petitioner James Bailey's testimony that he believed that his conviction for the theft of tapes from white people had something to do with the boycott. Supp. Br. 11; *see* J.A. 154-55. None of these "incidents" could have caused any of the damages alleged by the merchants in this case.

Other incidents now cited involve speech or conduct that falls well short of a violent act or threat. The merchants assert, for example, that Tullos Brown told a customer that he had "better not" go into a store. Supp. Br. 12. They also cite hearsay testimony that Wes Butler told Chief Porter that he (Butler) did not go into a store after petitioner George Henry Walker told him not to (Supp. Br. 12; *see* R. 2178, 2186), and that Preacher White (who died before the trial) told Porter that Albert Weathers had "threatened" White for buying gasoline at a white-owned service station (Supp. Br. 11; *see* J.A. 121, 123).[10] As Justice Holmes observed long ago, this

[10] The merchants also assert that petitioner Rudy Shields was "charged" with trespassing, profane swearing, and threatening two women at a country store. Supp. Br. 12. The Mississippi Supreme Court noted that Shields' conviction in this incident had been reversed on appeal (App. 24a) and did not rely on it.

simply begs the question, because the legality of a threat "depends on what you threaten." *Vegelahn v. Guntner*, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896) (dissenting opinion). The merchants also cite testimony by respondent Hudson that a number of petitioners "physically stopped customers" from entering stores. Supp. Br. 11-12; *see* J.A. 70-71. But there was no testimony by Hudson that this meant anything more than "stopping" a prospective customer on the public streets in order to talk with him, except for his earlier observation that "I have seen them catch an individual by the arm." J.A. 56.[11] It is not illegal to catch a person's arm to gain that person's attention.

The merchants have cited evidence that five of the petitioners took packages from people and that two others attempted unsuccessfully to do so (*see* J.A. 70-75; R. 646, 2050-55), and that Rudy Shields hit an employee of Hudson. We concede that, had the courts below found that these petitioners had committed these acts, they—like the participants in the Boston Tea Party—could have been held liable for any damages resulting from any lost patronage proximately caused by their acts. But, as in the case of James Bailey's destruction of Mrs. Butler's flower garden, there was no finding that any of these actions caused the merchants any business losses. The merchants offered no such proof, and the courts below made no such finding. Instead, the Mississippi Supreme Court found that violence was "present" during the boycott, and that this entitled the merchants to recover damages for all business losses suffered during the boycott from all participants in the boycott. As we have shown in our briefs, the First Amendment leaves no room for

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[11] For example, the only incidents in which Hudson ever implicated petitioner Joseph Barber, one of those who allegedly "stopped" customers from entering stores, include one in which there is no indication that Barber said or did anything, and another in which he simply told someone a store was under boycott and walked away. *See* Pet. Br. 36 n.39.

such a theory. There is accordingly no basis on this record upon which a judgment against the petitioners could stand.

CONCLUSION

For the reasons stated above and in our briefs, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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